RECENT AMERICAN DECISIONS.

In the Superior Court of Cincinnati.—General Term, June, 1855.

THE MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY ET AL. *vs.* CHARLES DUFFIELD ET AL.[1]

1. The *legal* meaning of the term *abandonment*, as used in a policy of insurance, is a transfer to the underwriter of the interest of the assured to the extent that *interest* is *covered* by the *policy*.
2. A policy of insurance contained the following clause: "And in all cases of abandonment, the assured shall assign, transfer, and set over to said insurance company, all their interest in and to the said steamboat, and every part, free of all claims and charges whatever.' The steamboat was assured only as to three-fourths of its value—was wrecked and abandoned to the insurance offices. Held, that the *abandonment* spoken of in the clause, and noted from the policy, could only be an abandonment in the *legal technical* sense of the word, and the owner had an interest of one-fourth in the boat after abandonment, as to which they were their own insurers.

An insurance was effected on the steamboat Sam Cloon, in four insurance companies; the agreed value of the boat being $20,000, and the amount insured in each office $3,750, or in all $15,000. The policy in each case was in the same form and with the same conditions.

The steamboat having been sunk in the Mississippi river, was by a writing executed for the purpose abandoned to the insurance companies, who by means of persons acting for them raised the boat, and realized from the wreck, after deducting charges and expenses, the sum of three thousand dollars. The present action was brought by the owners, who effected the insurance, to recover one-fourth of that sum, claiming that they all retained, after the abandonment, an interest of one-fourth in the wreck. This claim was resisted by the insurance companies, on the ground, that by the

[1] 2 Handy's Superior Court Rep. 122. We again take occasion to express our thanks to the Reporters of this volume for the early sheets.

terms and conditions of the policies, the owners were required to abandon not only to the extent of the interest insured, but all interest in the subject matter insured. The part of the policies supposed to bear on this question was as follows: "And in case of loss or misfortune, as aforesaid, it shall be the duty of the assured, their agents or assigns, to use every reasonable effort for the safeguard and recovery of the said steamboat, and every part thereof, and if recovered, to cause the same to be forthwith repaired, if practicable; and in case of neglect or refusal on the part of the insured, their agents or assigns, to adopt prompt and sufficient measures for the safeguard and recovery thereof, then said insurers are hereby authorized, and shall have the election to interpose and recover said steamboat, and cause the same to be repaired for account of the assured, to the charges of which the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value in this policy, or to consider such neglect or refusal as an abandonment, and be entitled to recover said steamboat, or any part thereof, at their own expense, and for their own use and benefit; and in no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repairs of said steamboat are impracticable; nor sell the wreck, or any part thereof, without the consent of this company; *and in all cases of abandonment the assured shall assign, transfer, and set over to said insurance company, all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatever.*"

On the submission of the action to be tried by the court at special term, a judgment was rendered in favor of the insured for one-fourth of the sum realized from the wreck. To reverse this judgment, a petition in error was filed by the insurance companies.

The opinion of the court was delivered by

GHOLSON, J.—The principle and foundation of all insurance is indemnity. The contract of insurance cannot be made a cover for gambling. It was at one time supposed in England, that *valued*

policies as they are called, were invalid, as falling under the prohibition against *wager policies*. But they were sustained as an estimate, by agreement of the parties, of the value of the subject matter of insurance. In the absence of fraud, in case of a total loss, the estimate of value so made must stand, but an average loss opens the policy. *Shawe* vs. *Felton*, 2 East, 109; 7 Mass. 369; 7 Ohio, 1, pt. 284.

In an open policy, if a loss happen, the value of the subject matter of insurance is fixed by reference to the time of the insurance, as in case of a vessel, at the time of the commencement of the voyage. And the only difference seems to be, that what in one case would be matter of proof, is in the other matter of agreement. 2 East, 109, 117; 7 Mass. 369.

Now, an insurance may be to the extent of a full indemnity, or for a partial indemnity; and to the extent that there is no indemnity, the owner of the subject matter of insurance has been said to be his own insurer.

So an indemnity to a certain extent may be obtained by a contract with A.; to a certain other extent with B., and so on; and still these several contracts may not provide for a full indemnity; to a certain extent the owner may be uninsured.

In an ordinary case where there is a partial loss, there takes place what is termed an adjustment; "and the rate of the loss being ascertained, the insurer is liable in the proportion which the sum insured bears to the actual value of the property included in the risk described in the policy." 7 Mass. 374; 2 J. C. 36. The effect of this rule is, as has been stated, to make the owner of the property insured contribute to his own loss in proportion as any part of its value may be uninsured. To secure a full indemnity, he must insure to the full value of the property. This rule of contribution does not apply under a policy against fire. 6 Pick. 186.

Where there has been in fact a partial loss, but the insured has made *an abandonment* to several insurers, and has been paid the amount of the indemnity for which he contracted, the same not extending to the whole value of the subject matter insured, is the adjustment made on the same principle? Is the owner considered

in this case, as in the other, in the light of an insurer? or does he renounce this right by the abandonment?

It is expressly stated in the elementary books, "that the abandonment cannot transfer the interest of the assured any further than that interest is covered by the policy." Arnould, 1159. This is in accordance with the rule laid down in 5 Peters, 622.

Indeed, the general proposition on this subject was not controverted in the argument, but the right of the assured to contribution in the case stated was admitted; at least it was admitted that such was the doctrine in all the recent elementary works on insurance."[1]

Admitting that after an abandonment to insurers, the amount of whose policies does not cover the value of the subject matter insured, the owner would be entitled to his proportion of what might be saved, it is claimed that this right is cut off by a clause in the

[1] Although the general doctrine was not controverted in this case, yet in a case probably on a policy similar to the one on which the present controversy arose, the court in Kentucky appears to have arrived at a different conclusion, and to have placed its decision on the ground that the general doctrine was different from that admitted in this case, as having been laid down in the elementary books. In the case of Cincinnati Insurance Company *vs.* Bakewell, 4 B. Monroe, 541, 544, it is said:

The claim of Farrow to a rateable interest in the net proceeds of the sale, proportioned to the uninsured part of the boat's agreed value in the policies, as it could only be made in that shape, on the ground that the abandonment was effectual, so it is, in our opinion, precluded by the same fact, upon the principle that an abandonment, legally made, puts the underwriters completely in the place of the assured, and operates in effect a transfer of property; Chesapeake Insurance Company *vs.* Stark, 6 Cranch, 272; Col. Insurance Company *vs.* Ashby, &c., 4 Peters' S. C. Rep. 144, &c., &c. And on this principle, with regard to which we have seen no contrariety of opinion or authority, the claim was rejected by the Chancellor. We may add, without deciding that such a claim would not, under any circumstances, be admissible, that as it is optional with the insured, even when he has the undoubted right of abandonment, either to retain the property and seek his indemnity in what may be saved by himself, and in his remedy, if he has one, for a partial loss, or by abandoning the property to secure a recovery for a total loss, leaving to the underwriter the chance of indemnity by saving what he can, at his own risk and expense, there is at least no equity in allowing the insured, after such abandonment, to come in for any share of what may be saved, while the underwriter is not indemnified."

policies in this case. Indeed, that is the only question made by the counsel for the parties in their argument, and we have referred to the principles before adverted to, only for the proper understanding of that question, and in aid of a true construction of the policies, on which a correct decision must depend.

The legal effect of an abandonment—the meaning of that term is now well understood by all who are conversant in matters of insurance. When, therefore, we find the term used in a policy of insurance, we are bound to suppose that the parties have used it in its legal sense. In that sense, it certainly does not mean simply an abandonment of the vessel; for an *abandonment* may be effectually made by an insured, who at the same time retains possession of the vessel, or goods abandoned, and sells or disposes of the same. Indeed, it is his duty to do so, unless the abandonment be accepted. And we need not say, that an abandonment may be effectual without any acceptance. So a vessel, when in a position which might well justify *an abandonment*, in its technical sense, as understood in the law of insurance, may be ever so completely abandoned in a literary sense; and yet such an act has nothing to do, and is in no manner connected, with an abandonment in a technical sense.

An abandonment, as that term is understood when applied to contracts of insurance, means the yielding up or surrendering to the insurer by the insured of the interest in the property covered by the insurance. It is usually done by the owner of the property when informed of the peril or loss. He gives to the insurer notice of an abandonment. The effect of an abandonment is to place the insurer, in reference to the interest covered by the policy, in the place of the insured. Some of the expressions used on this subject in the books, are very strong, and might well lead to the idea that the abandonment extended to the whole interest owned, and not merely that insured. 4 *B. Monroe*, 544.

When an insurer elects to claim a total loss, as he may in some cases where it is not so in fact, "as the thing insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he

receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realizing or increasing that value." *Roux* vs. *Salvador*, 3 Bingh. N. C. 266; 32 E. C. L. 110–120.

"The abandonment, where properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy." *Patapsco Ins. Co.* vs. *Southgate*, 5 Pet. 604, 622.

With this understanding of the legal meaning of the term "abandoment," we proceed to examine the clause in the policies which are claimed to extend the effect and operation of an abandonment beyond the limit before established by law. The clause taken singly is as follows: "In all cases of abandonment, the assured shall assign, transfer, and set over to said Insurance Company all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatever." Was it the intention, by the introduction into the policy, of this clause, to give to an abandonment an effect by agreement which it did not have by law?

In the case just cited from 5 Peters, it is said: "There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems, however, agreed that no particular form is necessary, nor is it indispensable that it should be in writing. But in whatever mode or form it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title and interest in the subject insured." In view of the remarks in the extract just quoted, it does not seem improbable that the framer of the policies under consideration, which for the most part, and especially as to the clause under consideration, are printed forms for general use, may have intended to guard against the difficulty of considering any doubtful or equivocal acts an abandonment, by a requisition that there should be a direct transfer and assignment of the interest, which should properly be yielded up or ceded by the insured to the insurer on claiming a total loss. And the clause may also have

been intended to insure a transfer or assignment of the interest free from the claims or charges of other persons.

If the term "abandonment" in the first part of the clause was used in its legal signification, as understood in the law of insurance, then, as before stated, it means a cession of the interest covered by the policy; and to say that in all cases of such a cession there shall be a transfer or assignment of all interest in the subject matter insured, free of all claims and charges whatever, can only properly refer to the form or mode in which the cession is to be effectuated, and not to its extent, that being fully shown by the use of the term "abandonment." If the construction claimed for the plaintiffs in error be correct, then the term "abandonment" cannot have been used in its proper legal sense, and the clause should have read: "in all cases of a claim for a total loss the assured shall assign, transfer, and set over (*i. e.* abandon, cede, by assignment or transfer) all their interest," &c. The abandonment or cession is consequent upon the claim for a total loss and necessary to make that claim effectual, as explained in the case of *Roux* vs. *Salvador*, before cited. It may be, if the intent otherwise required, that we would be justified in giving to the term "abandonment" the sense just indicated; but, as the latter part of the clause may have a proper meaning, without extending the operation and effect of an abandonment beyond that ascribed to it by law, and the other conditions and clauses of the policy do not require, but rather forbid such a construction, and it would in our judgment be attended, in several respects, with inconvenient results, we do not feel that it is a proper case for inferring that words were used in other than their proper legal sense.

It is not reasonable to suppose that the framer of the policies, had he intended so important a change in the operation and effect of an abandonment, as to make it include not only the interest covered by the policy, but all the interest of the insured in the subject matter of insurance, would have left that intention a matter of doubtful inference, or would have failed to express it in clear and apt language. A change of this description in policies of insurance should be unambiguous. It might in very many cases preclude the

insured from claiming a total loss, and would almost invariably create a difficulty where insurances had been effected in different offices, and they were unwilling to act together, for the insured could only abandon to one, and as that might be considered a sale or disposition of the wreck, which is prohibited by the policy, it might be doubtful whether he could recover from the others, even for a partial loss. But it is not necessary to enter more minutely into the inconveniences which might result from such a construction, as we are satisfied that upon the language used, the construction given by the Court at Special Term, resulting in a recovery by the insured, may be maintained. The judgment will, therefore, be affirmed.

Bates & Scarborough, Coffin & Mitchell, for plaintiffs in error.

Nixon, for defendants.

In the Supreme Court of Pennsylvania, 1854—*In Equity.*

THE WESTERN SAVING FUND SOCIETY OF PHILADELPHIA ET AL. *vs.* THE CITY OF PHILADELPHIA ET AL.[1]

1. By the original ordinance for the construction and management of the gas works of the old city of Philadelphia, the city was authorized, if it should deem expedient, to take possession of the works, and to convert the stock thereby created into a redeemable loan. The works in the meantime were to be controlled and managed in all respects by a board of trustees appointed by the City Councils. Additional stock was created by subsequent ordinances, with the same reservation of right to the city. In June, 1841, the city exercised this right, and certificates of loan were issued to the former stockholders. On June 14, 1841, an ordinance was passed authorizing a further loan for the extension of the works, by which the works were pledged for the payment of principal and interest of "*all* loans made for or on account of said gas works;" the faith of the city was pledged that the price of gas should not be reduced so as to reduce the clear profits below 8 per cent. a year; and it was expressly stipulated that the gas works and the funds thereof should be wholly controlled and managed by a board of trustees elected

[1] The following case, like several other important decisions of the last few years, has been omitted, from some incomprehensible reason, from the reports of the period. We regret that our space will not permit us to publish it in as complete a form as we could desire.